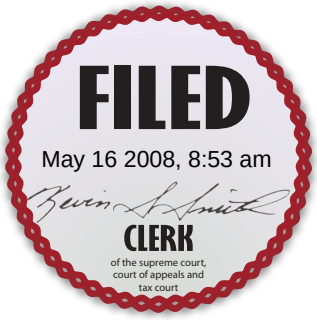

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IN THE
COURT OF APPEALS OF INDIANA

STEVEN BARLOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0709-CR-810
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0510-FA-26

May 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Steven Barlow appeals from his convictions for Burglary Resulting in Bodily Injury, as a Class A felony, and Theft, as a Class D felony, following a jury trial as well as the sentences imposed. He presents two issues for review:

1. Whether the trial court abused its discretion when it admitted a video tape of Barlow's confession.

2. Whether Barlow's sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 18, 2005, Margareta Harmon lived alone in an apartment in Lafayette. Immediately after she arrived home at 1:30 a.m. and locked her door, someone knocked and asked to be admitted. Harmon refused, told the person to leave, and called 911. Her attacker, an African American man in a hooded sweatshirt, broke through the door wielding a butcher knife. The man threw Harmon around the apartment while trying to get her pants down and, after succeeding, inserted his finger into her rectum. In the struggle, Harmon hit her head on a mirror. The man then demanded money and took Harmon's purse as he left. The purse contained Harmon's cell phone, some cash, and other items. Harmon could not identify her attacker.

On May 19 on the same street, Thomas Howard opened his sliding porch door at 6:15 a.m. and was attacked by an African American man wearing a ski mask. The attacker carried a ten-inch kitchen knife, stabbed Howard, broke Howard's glasses, and screamed at him. Howard could not identify his attacker.

At 4:50 a.m. on July 23, 2005, Barlow attacked Venessa Hicks at her home with a large knife. After a violent struggle, the attacker stole Hicks' purse. Three days later, Carol Horan awoke to find Barlow standing over her in her bedroom, holding a large knife. After Barlow was frightened away, Horan discovered that her cell phone, keys and some cash were missing. At the request of police, Horan kept her cell phone active. On the same day, N.G. awoke to find Barlow standing over her. Barlow bound N.G.'s hands behind her back and, with a knife to her throat, raped her.

The police used DNA evidence and Horan's cell phone records to identify Barlow as a suspect in the July crimes. Because of the similarity between the May and July crimes, Barlow was also a suspect in the May break-ins of Harmon's and Howard's apartments. In October 2005, a warrant was issued for Barlow's arrest. At the time, Barlow was incarcerated in Arizona, so Detective John Ricks of the Tippecanoe County Sheriff's Department and Detective Herb Robinson of the Lafayette Police Department ("LPD") traveled to Arizona to execute the arrest warrant.

The officers met Barlow in Arizona at 8:30 a.m. local time on October 5 and escorted him back to Indiana. The group traveled by plane to Indianapolis and then drove to Lafayette. The officers did not discuss the case with Barlow during the journey, and Barlow napped on the plane. Upon arriving in Lafayette, Barlow was taken to the Tippecanoe County Jail for processing and then to LPD headquarters. There, LPD Detectives Robinson and Johnson met with Barlow for no more than one hour, sharing a meal and talking about Barlow's musical aspirations, before they began their interrogation.

At approximately 6:25 p.m., Detective Johnson advised Barlow of his Miranda rights. The detective gave Barlow a copy of the advisement of rights and waiver form, which Barlow initialed to indicate his understanding. Barlow then signed the form. Between 6:25 p.m. and 8:30 p.m., Barlow gave an audio-taped statement to Detective Johnson, confessing to offenses not at issue in this appeal.

At 10 p.m. local time, 8 p.m. Arizona time, Detective Ricks returned to interrogate Barlow. At the start of the interrogation, Barlow signed a waiver of rights form. Detective Ricks said that the thought Barlow had committed the Harmon burglary, and Barlow answered affirmatively. The detective then encouraged Barlow to provide details about the crime. Barlow admitted that he had struggled with Harmon and that he had taken roughly $80 from Harmon's purse and split the money with his cousin.[1]

During the fifty-minute interrogation, Detective Ricks pointed out that the Harmon burglary was similar to the other crimes that Barlow had discussed with the LPD officers. The detective also implied that the investigation had uncovered DNA and fingerprint evidence linking Barlow to the Harmon crime. And he told Barlow that Barlow could probably be "fixed" through treatment. Appellant's App. at 51.

On October 13, 2005, the State charged Barlow with sixteen counts arising from the May and July offenses. The charges include one count of criminal deviate conduct, as a Class A felony; two counts of burglary resulting in bodily injury, as Class A felonies;

[1] Barlow also admitted that he had attempted to enter Howard's apartment but denied having entered the apartment, claiming that Howard's presence had frightened Barlow away.

and theft, as a Class D felony, all arising from the May offenses. The trial court granted Barlow's motion to sever the counts, and the counts at issue in the present appeal were tried before a jury in July 2007. On the first day of trial, Barlow orally moved to suppress the October 5 statement he gave to Detective Ricks.[2] The trial court denied that motion.

At the conclusion of the evidence, the jury found Barlow guilty of one count of burglary resulting in bodily injury, as a Class A felony, and theft, as a Class D felony, both relating to the break-in at Harmon's residence. But the jury could not reach a verdict on the other burglary count, regarding the Howard residence break-in, or the criminal deviate conduct count. On August 9, 2007, the trial court held a sentencing hearing. The court found Barlow's criminal history to be an aggravator and the sentence imposed on the severed counts, 120 total years, to be a mitigator. The court then found that the aggravator and mitigator balanced and sentenced Barlow to presumptive sentences, thirty years on the burglary count and one and one-half years on the theft count. The court ordered the burglary and theft sentences to be served consecutive to each other and to the 120-year sentence on the severed counts.[3] Barlow now appeals.

[2] Barlow had filed a written motion to suppress statement on July 7, 2007. The trial court denied that motion after a hearing on July 18, 2007.

[3] This court affirmed the 120-year aggregate sentence imposed on the severed counts in an unpublished memorandum decision. Barlow v. State, No. 79A05-0609-CR-478 (Ind. Ct. App. May 17, 2007).

DISCUSSION AND DECISION

Issue One: Admission of Evidence

Barlow contends that the trial court abused its discretion when it admitted into evidence statements he made to police officers while he was in custody. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Espinoza v. State, 859 N.E.2d 375, 381 (Ind. Ct. App. 2006). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Id.

When a defendant challenges the admissibility of a confession the State must prove beyond a reasonable doubt that the confession was given voluntarily. Jackson v. State, 735 N.E.2d 1146, 1153 (Ind. 2000). On review, this court looks to the totality of the circumstances surrounding the confession. Id. Relevant factors include the length, location, and continuity of the interrogation, and the maturity, education, physical condition, and mental health of the defendant. Clark v. State, 808 N.E.2d 1183, 1191 (Ind. 2004). To determine that a confession was given voluntarily, the court must conclude that inducement, threats, violence, or other improper influences did not overcome the defendant's free will. Id.

Barlow contends that the trial court abused its discretion when it denied his motion to admit his statement to the investigating officer. In particular, he argues that, under the totality of circumstances, his fatigue and confusion, and the interrogating officer's deceptive tactics and inducements, render Barlow's confession involuntary. We cannot agree.

Barlow's Fatigue and Confusion

First, Barlow contends that he was too tired and confused to voluntarily waive his rights before giving his statement to Detective Ricks. Specifically, he claims that the interrogation took place after a very long day, he had had little sleep the previous night, he was exhausted, and he was confused. Barlow states that he was unable to sleep the previous night in the Arizona jail. But, during the interrogation, Barlow agreed that he had slept nearly the entire flight from Phoenix to Indianapolis. Although the interrogation took place at 10 p.m., that was 8 p.m. Arizona time, less than twelve hours after the Indiana detectives had met Barlow to return him to Indiana. And Barlow was only questioned for approximately two hours by LPD detectives and less than one hour by Detective Ricks. Barlow has not shown that his statement to Detective Ricks was not voluntary due to Barlow's lack of sleep.

Barlow also has not shown that his alleged confusion rendered his confession involuntary. Barlow asserts that he was confused in part because of lack of sleep. But, as noted above, he has not shown that lack of sleep impaired his ability to voluntarily waive his rights before making a statement. He also argues that he was confused "due to a lack of intelligence." Appellant's Brief at 18. In support, he notes that he had not graduated from high school and that he had consumed a large amount of alcohol for a number of years. But Barlow does not cite to any authority, nor are we aware of any, to show that his lack of education or his history of alcohol consumption affected his intelligence. Thus, he has waived that argument on appeal. See Ind. Appellate Rule 46(A)(8)(a) ("The

argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.").

Deceptive Practices

Barlow next contends that Detective Ricks obtained Barlow's confession by using deceptive tactics and inducements. "[P]olice deception does not automatically render a confession inadmissible. Rather, it is only one factor to consider in the totality of the circumstances." Clark, 808 N.E.2d at 1191. Promises of leniency render a statement involuntary, but vague statements that the defendant benefits by cooperating and telling the real story do not constitute sufficient promises. Giles v. State, 760 N.E.2d 248, 250 (Ind. Ct. App. 2002).

Here, during the interrogation, Detective Ricks told Barlow, "your cooperation I know goes a long way[,] it really does[.]" Appellant's App. at 38. The detective also implied that Barlow might be a candidate for counseling:

> Ricks: Now, the whole thing is, we can't get you the right kind of help for the right kind of problem unless you're forthcoming with us. Ok. Some of these things need some help, you know, kind up here. Not just throw you in a jail cell and lock ya up. That ain't gonna do you no good. Sometimes you need help up here just to rethink. Sometimes we need to kind of recalibrate our thinking, you know.
>
> Barlow: Uh-huh (affirmative).
>
> Ricks: And it sounds like you have some alcohol or drug abuse issues going on back then. Maybe you did right up to the day you got locked up, I don't know. Maybe when you get these things going, your grain kind of gets out of whack a little bit and you don't think quite straight and you do things that you shouldn't normally do. You know, just like sticking your finger up, you know, somebody's (UI) that you don't know. You know. But we need to know about these things and

> understand them because we need to get you the right kind of help for the right kind of problem. . . .
>
> * * *
>
> Barlow: Now what's some time gonna do for me? You know, like counseling.
>
> Ricks: Certainly time won't do anything for it, probably some uh, counseling or something like that does help.
>
> Barlow: I'm . . . hospitalization?
>
> Ricks: And that's all up to the, what the, what the, the prison system classifies you, you, know what I mean? They look at what's happened. The court has some say, I believe, you know, in what they do. Things in what they can court order certain treatments things. But then the DOC, they'll classify you, you know, with the crimes that you've done. And send you to the right place to get things, you know, cause every place isn't the same and you need recalibrated, that's all there is to it, you know. Just plain old time doesn't heal everything. Ok. But this type of thing is fixable, you know. . . .

Appellant's App. at 48, 51. Detective Ricks also told Barlow, "people like you, I, I'm sure they can work with," "I can't see why you can't be fixed[,]" and "You know you're gonna be back out in society . . . ." Id. at 51. Barlow argues that such comments induced him to confess, rendering that confession involuntary.

In Giles, after the defendant continued to deny wrongdoing, the interrogating officer said:

> [I'm] not trying to get you in jail . . . I can't work with you if you don't, if you don't, if you're not gonna admit it . . . I know that you're somebody, you're a good person. You're somebody that I can work with. I would say that probably if we could talk to the prosecutor and get an agreement (inaudible) where you probably go to, I'm thinking Mulberry, Deaconess, Crosspoint, or something and have few sessions, or at least, talk to some pro, talk to some professionals . . . Well if you walk out of here now without telling['] me that something happened then I'm not liable you are

> . . . I'm tryin['] to be up front with you . . . this prosecutor's not going to try and hang you in this case. I will tell you up front he's not looking for you to get jail time . . . So after you talk to the prosecutor or we talk to the prosecutor you can feel secure in yourself that it's not necessarily gonna get broadcast to the world. [It's] not gonna be put up bell lights or something.

Id. (alterations original). This court held that the officer's comments may have suggested prosecutorial leniency but they did not rise to the level of "'direct or implied promises of immunity or leniency' in exchange for a confession." Id. (quoting Fields v. State, 679 N.E.2d 1315, 1320 (Ind. 1997)).

Here, Detective Rick's statements were similar to those made in Giles. Detective Ricks did not promise counseling or any other type of leniency; he merely suggested the possibility. Again, a vague statement that cooperation was in Barlow's best interest is not coercion. See Giles, 760 N.E.2d at 250. Thus, Detective Ricks' statements regarding counseling, that Barlow could be "fixed," and that "cooperation goes a long way" do not constitute promises of leniency so as to render Barlow's confession involuntary.

Barlow also argues that Detective Ricks' reference to fingerprint evidence linking Barlow to Howard's residence "must weigh against the validity of [Barlow's] confession." Appellant's Brief at 23. But Barlow acknowledges that the use of police deception does not automatically render a confession inadmissible. In Miller v. State, 770 N.E.2d 763 (Ind. 2002), our supreme court considered whether a defendant's motion to suppress his confession was properly denied even though the police had used false evidence during the interrogation. There, the interrogating officer told the defendant that a witness had seen the defendant outside the victim's office door, presented the defendant with a false fingerprint card and told him that his fingerprints had been found in the

victim's office, and reported that the victim had died of natural causes. None of those things were true.

The supreme court considered the use of deceptive police tactics together with the other factors affecting the voluntariness of the defendant's confession. Specifically, the court noted that, at the time of the interrogation, the defendant was forty years old, employed, did not appear to be incoherent or under the influence of alcohol or drugs, and spoke normally, and there was no indication that the police knew he was mentally retarded.[4] Id. at 769. The court also observed that the defendant's criminal history evidenced his familiarity with the criminal justice system. Id. The court held that the use of such deceptive tactics did not render the defendant's confession involuntary in light of the totality of circumstances. Id. at 770.

Similarly, here, Detective Ricks told Barlow that he had fingerprint evidence linking Barlow to the Howard residence break-in. Barlow was twenty-eight years old at the time of the interrogation, he had been employed, he stated that he understood the waiver of rights when he signed it, and he did not appear to be under the influence of alcohol or drugs. There is no indication that he appeared unable to comprehend the waiver or rights, and, again, he has not demonstrated that his intelligence level affected the voluntariness of his statement. Thus, like the defendant in Miller, Barlow's confession was not made involuntary by Detective Ricks' use of false fingerprint evidence. Moreover, Barlow denied breaking into Howard's residence, and he was not convicted of that break-in. Thus, even if Detective Ricks had erred by referring to

[4] The supreme court found that the defendant in Miller was a mentally retarded person pursuant to Indiana Code § 35-36-9-5 but that he understood all of his legal rights.

nonexistent fingerprint evidence, such error was harmless. Considering the totality of the circumstances, we conclude that Detective Ricks' use of false evidence during the interrogation did not render Barlow's confession involuntary.

Issue Two: Appellate Rule 7(B)

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), (alteration original), clarified in part on other grounds, 875 N.E.2d 218 (Ind. 2007). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Barlow contends that his sentence is inappropriate in light of the nature of the offense and his character. While he does not contest the imposition of the advisory sentence on each count, he argues that the trial court should not have ordered those sentences to be served consecutive to each other and to the aggregate sentence imposed on the severed counts. We cannot agree.

With regard to the first factor, Barlow asserts that the nature of the offense does not warrant "an extra 31 ½ years on top of a virtual lifetime sentence of 120 years." Appellant's Brief at 28. In support, he observes that Harmon sustained a "bump on the head resulting in nothing more than a headache and bruising, and for which [she] refused medical treatment[.]" Id. But that does not describe the offense in its entirety. When Harmon did not answer her door, Barlow broke the door down, entered the apartment, and accosted Harmon with a butcher knife. He forcibly tried to remove her pants and, in the struggle with her, caused Harmon hit her head on a mirror, shattering the glass. Barlow then demanded money, grabbed Harmon's purse, and ran out of the apartment.

The trial court imposed the thirty-year advisory sentence for burglary resulting in bodily injury and the presumptive one and one-half year sentence for theft. The court ordered the sentences to be served consecutive to each other and to the 120-year aggregate sentence imposed on the severed counts. Given the forceful nature of the entry, the fact that Barlow was armed with a deadly weapon, his physical attack and struggle with Harmon, and Harmon's resulting injury, we cannot say that the imposition of the presumptive sentences on these two counts, to run consecutive to each other, was inappropriate.

We next consider whether, in light of the nature of the offenses, ordering the thirty-one-and-one-half-year sentence to be served consecutive to the 120-year aggregate sentence was inappropriate. The court had discretion to order the sentences imposed here to be served consecutive to the sentences imposed on the severed counts. See Ind. Code

Ann. § 35-50-1-2(c).[5] All of the offenses were similar in that they were committed late at night, with Barlow breaking in and threatening his victims with a large knife. Struggles ensued in some of the other offenses, too, resulting in injury to the victims. Thus, we conclude that the imposition of consecutive sentences, resulting in an aggregate 151½-year sentence, was not inappropriate. See Major v. State, 873 N.E.2d 1120, 1131 (Ind. Ct. App. 2007) (holding on Rule 7(B) review that nature of offense, namely, fact of multiple victims, justified imposition of consecutive sentences).

Barlow also contends that the imposition of consecutive sentences was inappropriate in light of his character. He acknowledges that his prior arrests and convictions are proper considerations that reflect on his character and the risk that he would commit other crimes. See Monegan v. State, 756 N.E.2d 499, 503 (Ind. 2001) (considering prior arrests as an aggravator under Indiana Code Section 35-35-1-7.1(d) does not violate due process). But he asserts that those factors were not used for those purposes. However, he does not cite to anything in the record or any case law in support of his contention that his arrests and convictions were used inappropriately by the trial

[5] Indiana Code Section 35-50-1-2(c) provides, in relevant part:

> Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:
>
> (1) aggravating circumstances in IC 35-38-1-7.1(a); and
>
> (2) mitigating circumstances in IC 35-38-1-7.1(b);
>
> in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. . . .

(Emphasis added).

court in determining to order consecutive sentences. Thus, he has waived the argument. See App. R. 46(A)(8)(a).

Waiver notwithstanding, we conclude that the trial court properly considered Barlow's prior arrests and the convictions for the severed counts when it determined to impose consecutive sentences. As noted above, Barlow concedes that his prior arrests and prior convictions may properly be considered as reflecting on his character for sentencing purposes. To the extent Barlow is arguing that the sentences imposed on the severed counts are not proper considerations for determining consecutive sentences, that contention is without merit. See I.C. § 35-50-1-2(c) ("The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. . . ."). Thus, we hold that Barlow's thirty-one-and-one-half-year sentence, which was to be served consecutive to his 120-year sentence, is not inappropriate in light of his character.

Affirmed.

DARDEN, J., and BROWN, J., concur.